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No. 55

Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, *Appellant*

v.

E. I. DU PONT DE NEMOURS and COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

PETITION OF E. I. du PONT de NEMOURS AND COMPANY FOR MODIFICATION OF OPINION

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May, 1961

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PETITION FOR MODIFICATION OF OPINION

Du Pont respectfully petitions this Court for a modification of so much of its opinion of May 22, 1961, as directs that the decree to be entered by the District Court shall provide that divestiture is to "be completed within not to exceed ten years, of the effective date of the District Court's judgment."

It is the position of du Pont, as it has been the position of the United States before this Court, that the time period within which the complete divestiture decreed by this Court is to be accomplished is an issue altogether separate and distinct from the issue as to whether that complete divestiture was required. The

issue as to the time period within which divestiture should be accomplished was not tendered by the United States to this Court for decision, but rather was sought to be reserved by the United States for decision by the District Court in the event of the reversal of that Court's decree that has now taken place. That question should, in the first instance, be determined by the District Court after an appraisal of all the relevant circumstances.

In its brief in this Court, the United States urged that complete divestiture was required in this case, and that du Pont should be required to file in the District Court a proposed judgment providing for that complete divestiture. No contention was made by the United States, however, in its "Suggested Directions to the District Court" (Br., pp. 80-83), or elsewhere in its brief, that this Court should foreclose the District Court from exercising its equitable discretion to decide in the first instance a question which it has heretofore had no occasion to decide—the time period within which this complete diverstiture should take place.

The issue is not one on which the United States has simply failed to take a position. In the course of oral argument before this Court counsel for the United States explicitly and affirmatively urged that, should this Court order complete divestiture, the time period within which that divestiture was to be accomplished should be submitted for initial decision to the District Court. Because this passage from counsel's argument not only clearly sets forth the position of the United States, but also states precisely what du Pont believes to be the equitable and proper disposition of this issue, we think it appropriate here to set it forth:

MR. DAVIS: "I want to say a brief word about the impact of divestiture on the interests of the various stockholders.

"There have been some comments that if it were divested in this way or that it would take a long period of time, some, say, 26 years, if the dividends are in such number or if you sell it in a certain amount, it would take 20 years.

"Our plan, the plan we proposed in the District Court, called for a ten-year period of divestiture, with a right to approach the Court if more time is necessary.

"The period of ten years, although it was thought appropriate at the time, and I think it is appropriate now, is not the essence of our plan.

"As far as I am concerned, I think if the effects are so bad that you need more time to separate this thing, it is a much better thing to give more time for the separation, but to get it started on its way, rather than to have a continuation of this relationship into the indefinite future, and that is what that plan suggests.

"So that if it is only a question of whether it should be ten or twenty years, I think this is the kind of a thing that can be worked out with the Court, with the District Court.

"I think it is just exactly the kind of thing where a District Court's discretion is important and where they can really appraise the evidence."[1]

This position of the United States, which may properly be assumed to be alert to the requirements of the public interest in this litigation, has a firm legal foundation in the circumstances of this case. Because the District Court found that complete divestiture was not required to insure effective relief, it had no occa-

[1] See to the same effect Brief for the United States, p. 36.

sion to decide the length of time which should be permitted for that divestiture in order to minimize economic dislocation to the extent consistent with the public interest. That question, which necessarily involves a detailed appraisal of the evidence and a weighing of many factors, is, as counsel for the United States has said, "just exactly the kind of thing where a District Court's discretion is important." We ask no more than that the District Court be permitted to exercise that discretion.

Du Pont's interest throughout the proceedings on relief has been in minimizing the economic harm to its shareholders that will be caused by whatever decree is finally entered, to the extent that this may be accomplished consistent with the public interest. Complete divestiture over any length of time will cause these shareholders economic hardship. This Court, however, has now concluded that no less sweeping remedy can be effective in this case, and accordingly that private harm must be deemed to be outweighed by the public interest. But surely in determining how, and over how long a period, divestiture is to be accomplished it is altogether appropriate for a court of equity to fashion its decree so as to reach the required result in a way which inflicts injury only to the extent necessary to protect the public interest.

The United States has recognized that an equitable balancing of the pertinent factors might well result in the fixing of a time period longer than ten years. In addition to the statement by Government counsel quoted above, there are other statements made on behalf of the United States in the course of this litigation that recognize that a period of as much as twenty years for divestiture would not be inconsistent

with adequate protection of the public interest should it be warranted by the circumstances.[2] There was also evidence before the trial court which indicated that the consequences of divestiture could be to some extent alleviated by the fixing of such a longer period.[3] Should it hereafter be shown that the public interest demands that the period of divestiture be no longer than ten years, then again private interests must give way. But this is a question which can be determined fairly and equitably only after the consideration of evidence and the hearing of argument directed specifically to the issue. Only this mode of disposition would be consistent with the rule stated by the Court in this very case (p. 6)—"we assign to the District Courts the responsibility *initially* to fashion the remedy * * * ".

The modification which we request will not extend or protract the forthcoming proceedings in which the District Court will determine the other terms and conditions of the decree. If any addition to the present record is required, a brief and modest supplementation will suffice to enable the District Court to make an informed and equitable judgment as to a time period for divestiture which gives due regard to both public and private interests.

We share the desire of the Court to terminate this litigation as soon as possible. Although under the Rules of the Court this petition is not due until June 16, 1961, we have accelerated its filing in order that the

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[2] Memorandum on behalf of the United States in support of the Government's proposed Final Judgment, pp. 30-31 (September 26, 1958), reprinted at R. 62-63. See also R. 794, 1066.

[3] R. 1545-1546, 1610-1611, 1739, 1807-1808, 2084-2085.

Court may, if it deems it appropriate, request and receive a response from the United States in time to dispose of the petition before the end of the present Term.

Respectfully submitted,

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May, 1961

I hereby certify that this petition is presented in good faith, and not for purposes of delay.

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